

1 EMILY L. MURRAY (BAR NO. 223815)
2 RACHEL M. SANDERS (BAR NO. 258652)
3 ALLEN MATKINS LECK GAMBLE
4 MALLORY & NATSIS LLP
5 515 South Figueroa Street, Ninth Floor
6 Los Angeles, California 90071-3309
7 Phone: (213) 622-5555
8 Fax: (213) 620-8816
9 E-Mail: emurray@allenmatkins.com
10 rsanders@allenmatkins.com

11 Attorneys for Defendants
12 One West Bank, FSB and Deutsche Bank National
13 Trust Company, as Trustee of the IndyMac INDX
14 Mortgage Trust 2007-AR21IP, Mortgage Pass-
15 Through Certificates, Series 2007-AR21IP

16 UNITED STATES DISTRICT COURT
17 CENTRAL DISTRICT OF CALIFORNIA

18 GORDON FORBES III,

19 Plaintiff,

20 vs.

21 ONE WEST BANK, F.S.B.;
22 DEUTSCHE BANK NATIONAL
23 TRUST COMPANY, AS TRUSTEE OF
24 THE INDYMAC INDX MORTGAGE
25 TRUST 2007-AR21IP UNDER THE
26 POOLING AND SERVICING
27 AGREEMENT DATES 07-18-2003;
28 MERIDIAN FORECLOSURE
SERVICE, A CALIFORNIA
CORPORATION, AND DOES 1-10,
inclusive,

Defendants.

Case No. 2:12-cv-09869-MWF-CW

OPPOSITION OF ONE WEST BANK,
FSB AND DEUTSCHE BANK
NATIONAL TRUST COMPANY, AS
TRUSTEE OF THE INDYMAC INDX
MORTGAGE TRUST 2007-AR21IP,
MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2007-AR21IP
TO PLAINTIFF'S MOTION FOR
ORDER DISMISSING COMPLAINT
WITHOUT PREJUDICE

Date: April 29, 2013

Time: 10:00 a.m.

Ctrm: 1600

Judge: Hon. Michael W. Fitzgerald

Complaint Filed: November 16, 2012

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. FACTUAL AND PROCEDURAL HISTORY	1
III. DISMISSAL SHOULD BE WITH PREJUDICE	2
A. Legal Standard.....	2
B. Defendants Will Suffer Legal Prejudice if Dismissal is Without Prejudice.....	3
C. Plaintiff Has Failed to State a Claim, Entitling Defendants to Dismissal With Prejudice	4
IV. CONCLUSION.....	5

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>Brereton v. Bountiful City Corp.</i> , 434 F.3d 1213 (10th Cir. Utah 2006)	3, 4
<i>Fischer v. Zespri Fresh Produce N. Am., Inc.</i> , 2007 U.S. Dist. LEXIS 60563 (E.D. Cal. Aug. 17, 2007).....	3, 4
<i>Fla. Evergreen Foliage v. E.I. Dupont De Nemours & Co.</i> , 336 F.Supp.2d 1239 (S.D. Fla. 2004)	3
<i>Gomes v. Countrywide Home Loans, Inc.</i> , 192 Cal.App.4th 1149 (2011)	4
<i>Martin v. Winett</i> , 2012 U.S. Dist. LEXIS 85741 (E.D. Cal. June 20, 2012)	2, 3
<i>McKown v. United States</i> , 2013 U.S. Dist. LEXIS 46213 (E.D. Cal. Mar. 28, 2013).....	1, 2, 3, 4
<i>Paulucci v. City of Duluth</i> , 826 F.2d 780 (8th Cir. 1987)	3
<i>Phillips USA, Inc. v. Allflex USA, Inc.</i> , 77 F.3d 354 (10th Cir. 1996)	2, 3
<i>Smith v. Lenches</i> , 263 F.3d 972 (9th Cir. 2001)	2

Rules

Federal Rule of Civil Procedure 12(b)(6)	3
Federal Rule of Civil Procedure 41(a)(2)	1, 2, 4

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Gordon Forbes III ("Plaintiff") moves the Court to dismiss his First Amended Complaint ("FAC") without prejudice pursuant to Federal Rule of Civil Procedure ("FRCP") 41(a)(2). Defendants OneWest Bank, FSB and Deutsche Bank National Trust Company, as Trustee of the IndyMac INDX Mortgage Trust 2007-AR21IP, Mortgage Pass-Through Certificates, Series 2007-AR21IP (collectively, "Defendants") do not oppose dismissal of the FAC, but contend that dismissal should be with prejudice. As such, there is no question as to whether the action should be dismissed – the only issue is whether the action should be dismissed with or without prejudice.

Dismissal with prejudice is appropriate because the timing of Plaintiff's motion strongly indicates that the only reason he is seeking dismissal is an anticipated ruling adverse to Plaintiff on Defendants' pending Motion for Judgment on the Pleadings ("MJOP"). *McKown v. United States*, 2013 U.S. Dist. LEXIS 46213 (E.D. Cal. Mar. 28, 2013). In addition, dismissal with prejudice is appropriate because Plaintiff has failed to justify his five month delay in seeking voluntary dismissal and/or replacing his counsel, and Defendants have incurred substantial costs in responding to this meritless action. (*Id.*) Finally, as set forth in Defendants' MJOP, Plaintiff has not and cannot state a claim, which is an independent basis for dismissal with prejudice.

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiff's original Complaint in this action was filed on November 16, 2012. (Docket No. 1.) The lawsuit relates to a mortgage loan obtained by Plaintiff, upon which Plaintiff has admittedly defaulted. (FAC, ¶ 24.) Defendants filed an answer and a motion for judgment on the pleadings with respect to Plaintiff's original Complaint, which was unopposed and granted by the Court with leave to amend on January 24, 2013. (Docket No. 14.) The Court's order noted that "the Motion

1 appears to be well taken in identifying insufficiencies in Forbes's Complaint." (*Id.*)
 2 Plaintiff nevertheless filed a substantially similar FAC on or about February 13,
 3 2013. (Docket No. 20.)

4 Defendants filed an MJOP with respect to the FAC on March 5, 2013, which
 5 is set for hearing on April 15, 2013. (Docket No. 22.) On March 29, 2013, Plaintiff
 6 substituted in place of his prior counsel, and filed his FRCP 41(a)(2) motion for
 7 voluntary dismissal without prejudice, which is set for hearing on April 29, 2013.
 8 (Docket Nos. 27, 29.) Plaintiff claims that he did not review or approve the prior
 9 pleadings in this case, and disagreed with the manner in which his prior counsel
 10 presented the case. (Docket No. 29, at 3.)

11 **III. DISMISSAL SHOULD BE WITH PREJUDICE**

12 **A. Legal Standard**

13 FRCP 41(a)(2) allows the courts to grant a plaintiff's request for voluntary
 14 dismissal without prejudice "unless a defendant can show that it will suffer some
 15 plain legal prejudice as a result." *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir.
 16 2001). "[L]egal prejudice' means 'prejudice to some legal interest, some legal
 17 claim, some legal argument.'" *Id.*

18 In whether legal prejudice will result, "... a court may consider whether the
 19 plaintiff is requesting a voluntary dismissal only to avoid a near-certain adverse
 20 ruling." *McKown, supra*, 2013 U.S. Dist. LEXIS 46213 at *8-10. A party should
 21 not be permitted to avoid an adverse decision on a dispositive motion by dismissing
 22 a claim without prejudice. *Id.*, citing *Martin v. Winett*, 2012 U.S. Dist. LEXIS
 23 85741 at *2 (E.D. Cal. June 20, 2012); *Phillips USA, Inc. v. Allflex USA, Inc.*, 77
 24 F.3d 354, 358 (10th Cir. 1996). Thus, an attempt by the plaintiff to avoid an adverse
 25 decision on the merits may constitute legal prejudice, meriting dismissal with
 26 prejudice.

27 Other factors the court may consider in determining whether a defendant will
 28 suffer legal prejudice include: (1) the defendant's effort and expense involved in

1 preparing for trial; (2) excessive delay and lack of diligence on the part of the
 2 plaintiff in prosecuting the action; (3) insufficient explanation of the need to take a
 3 dismissal; and (4) the fact that summary judgment has been filed by the defendant.
 4 *Fischer v. Zespri Fresh Produce N. Am., Inc.*, 2007 U.S. Dist. LEXIS 60563 at *8-9
 5 (E.D. Cal. Aug. 17, 2007), citing *Paulucci v. City of Duluth*, 826 F.2d 780, 783 (8th
 6 Cir. 1987)).

7 In addition, as set forth in Defendants' MJOP, dismissal with prejudice is
 8 appropriate where it is clear that Plaintiff cannot state a claim. FRCP 12(b)(6); *see*
 9 *also Fla. Evergreen Foliage v. E.I. Dupont De Nemours & Co.*, 336 F.Supp.2d
 10 1239, 1252 (S.D. Fla. 2004) (stating that "when on the basis of a dispositive issue of
 11 law no construction of the factual allegations will support the cause of action,
 12 dismissal of the complaint is appropriate."); *see also Brereton v. Bountiful City*
 13 *Corp.*, 434 F.3d 1213, 1219 (10th Cir. Utah 2006) (stating that "[a] dismissal with
 14 prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6)
 15 and granting leave to amend would be futile.")

16 **B. Defendants Will Suffer Legal Prejudice if Dismissal is Without**
 17 **Prejudice**

18 The timing of Plaintiff's request for dismissal – after his opposition to the
 19 MJOP had been filed, but before the hearing date – strongly suggests that the sole
 20 reason that he is seeking dismissal is anticipation of an adverse ruling on
 21 Defendants' MJOP. Avoidance of an adverse ruling on the MJOP is an
 22 impermissible basis for Plaintiff to obtain a voluntary dismissal without prejudice.
 23 *See McKown, supra*, 2013 U.S. Dist. LEXIS 46213 at *8-10; *Martin, supra*, 2012
 24 U.S. Dist. LEXIS 85741 at *2; *Phillips, supra*, 77 F.3d at 358. For this reason
 25 alone, there is legal prejudice to Defendants, and dismissal must be with prejudice.

26 In addition, the action has been pending for five months, and Plaintiff's
 27 complaint has already been amended once. Plaintiff had ample prior opportunity to
 28 replace his counsel, if he was truly dissatisfied with their work, or to request

1 voluntary dismissal. Plaintiff has not justified his five month delay in seeking
 2 dismissal and/or replacing his counsel. This too is prejudicial to Defendants, and a
 3 basis for dismissal without prejudice. *See McKown, supra*, 2013 U.S. Dist. LEXIS
 4 46213 at *8-10; *Fischer, supra*, 2007 U.S. Dist. LEXIS 60563 at *8-9. Moreover,
 5 Defendants have incurred significant time and expense in litigating this meritless
 6 action, which is also prejudicial and a basis for dismissal without prejudice. (*Id.*)

7 Accordingly, legal prejudice to Defendants will result from a dismissal
 8 without prejudice, and dismissal pursuant to FRCP 41(a)(2) should be with
 9 prejudice.

10 **C. Plaintiff Has Failed to State a Claim, Entitling Defendants to**
 11 **Dismissal With Prejudice**

12 As set forth in detail in Defendants' pending MJOP, Plaintiff has not and
 13 cannot state a claim upon which any type of relief can be granted. Each of the
 14 causes of action set forth in both the initial Complaint and the FAC rely entirely on
 15 allegations challenging the securitization and assignment of the loan. (FAC, ¶¶ 18-
 16 22.) Defendants' MJOP explains that Plaintiff lacks standing to challenge the
 17 validity of the securitization process or the Assignment to DBNTC as Trustee.
 18 Under California's statutory scheme governing nonjudicial foreclosure, Plaintiff is
 19 not permitted to go behind the documents recorded with the Santa Barbara County
 20 Recorder's Office to assert that DBNTC as Trustee somehow did not obtain the
 21 beneficial rights granted by the validly recorded assignment. *See Gomes v.*
 22 *Countrywide Home Loans, Inc.*, 192 Cal.App.4th 1149, 1154 (2011). Plaintiff has
 23 not set forth any other allegations to support any of his causes of action, and indeed,
 24 has not set forth any allegations whatsoever to support any cause of action.
 25 Dismissal with prejudice is therefore independently warranted on the MJOP. *See*
 26 *Brereton, supra*, 434 F.3d at 1219.

27 This matter should be dismissed on Defendants' MJOP – or Plaintiff's Motion
 28 – with prejudice because Plaintiff cannot state a claim.

1 **IV. CONCLUSION**

2 In light of the foregoing, and in light of the arguments previously made in
3 Defendants' MJOP, Defendants respectfully request that this matter be dismissed
4 with prejudice.

5
6 Dated: April 8, 2013

7 ALLEN MATKINS LECK GAMBLE
8 MALLORY & NATSIS LLP
9 EMILY L. MURRAY
10 RACHEL M. SANDERS

11 By: /s/ Emily L. Murray

12 EMILY L. MURRAY
13 Attorneys for Defendants
14 OneWest Bank, FSB and Deutsche
15 Bank National Trust Company, as
16 Trustee of the IndyMac INDX
17 Mortgage Trust 2007-AR21IP,
18 Mortgage Pass-Through Certificates,
19 Series 2007-AR21IP
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and am not a party to this action. My business address is 515 South Figueroa Street, Ninth Floor, Los Angeles, California 90071-3309.

On April 8, 2013, I served the within document(s) described as:

OPPOSITION OF ONEWEST BANK, FSB AND DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE INDYMAC INDX MORTGAGE TRUST 2007-AR21IP, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-AR21IP TO PLAINTIFF'S MOTION FOR ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

on the interested parties in this action as stated below:

Gordon Forbes, III
635 ½ Chapala Street
Santa Barbara, CA 93101

Plaintiff in Pro Per

☒ **BY OVERNIGHT DELIVERY:** I deposited in a box or other facility regularly maintained by FedEx, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in sealed envelopes or packages designated by the express service carrier, addressed as indicated above on the above-mentioned date, with fees for overnight delivery paid or provided for.

☒ **BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – The above-described document(s) will be served by the Court via NEF. On **April 8, 2013**, I checked the CM/ECF docket for this case and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

- **Michael William Burnett**
mwb@burnettpc.com,tanielski@burnettpc.com
- **Daniel P Lucid**
Daniellucid@realestatelawcenter.org,Dan@bestcases.org,daniellucid@rocketmail.com

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 8, 2013, at Los Angeles, California.

Lorrie Anderson
(Type or print name)

/s/ Lorrie Anderson
(Signature of Declarant)